Petition

81-765

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

FRANKLIN LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE FOURTH JUDICIAL CIRCUIT

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Attorneys for Petitioner

QUESTIONS PRESENTED

1. When prosecuting a defendant pursuant to an indictment brought under 18 U.S.C. § 1505, must the government prove as an element of the crime that the "proceedings" allegedly interfered with were "due and proper" as prescribed by the statute?

2. May a defendant be prosecuted for allegedly violating the omnibus provision of 18 U.S.C. § 1505, when pursuant to an Internal Revenue Service tax delinquency inquiry the defendant acquiesces to a plan to avoid a government levy, and subsequently, at trial, the government fails to prove a "corrupt" act in furtherance of the proscribed endeavor?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Franklin Lewis—Petitioner
2. The United States of America—Respondent

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TABLE OF CONTENTS

	Page
List of Authorities	III
Opinion Below	1
Jurisdiction.	2
Questions Presented	2
Constitutional and Statutory Provisions Involved.	3
Statement of the Case	3
Reasons For Granting Certiorari . .	7
Question 1	8
Question 2	13
Conclusion.	23
Appendix.	A-1

LIST OF AUTHORITIES

CASES

Allen Oil Co., Inc. v. Commissioner of Internal Revenue, 614 F.2d 336 (2d Cir. 1980). . .	10
Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir. 1978)	11
Ex parte Public Bank of New York, 278 U.S. 101 (1928).	10

Page

Haili v. United States, 260 F.2d 744 (9th Cir. 1958). 20

In re Winship, 397 U.S. 358 (1970) 9,12

Reiter v. Sonotone Corp., 442 U.S. 330 (1979). 10,22

Rice v. United States, 356 F.2d 709 (8th Cir. 1966). 16

United States v. Abrams, 427 F.2d 86 (2d Cir. 1970) . 15

United States v. Arias, 575 F.2d 253 (9th Cir. 1978). 12

United States v. Batten, 226 F. Supp. 492 (D.D.C. 1964), cert. denied, 380 U.S. 912 (1965). 16

United States v. Browning, Inc., 572 F.2d 720 (10th Cir. 1978). 14

United States v. Cades, 495 F.2d 1166 (3d Cir. 1974). 12

United States v. Carr, 550 F.2d 1058 (6th Cir. 1971). 12

United States v. Essex, 407 F.2d 214 (6th Cir. 1969). 20

Page

United States v. Fasolino, 449 F. Supp. 586 (W.D.N.Y.), aff'd, 586 F.2d 939 (2d Cir. 1978) 22

United States v. Haas, 583 F.2d 216 (5th Cir. 1978). 21

United States v. House, 524 F.2d 1035 (3d Cir. 1976). 13

United States v. Malde, 513 F.2d 97 (1st Cir. 1975). 12

Worsham v. Murchison, 66 Ga. 715 (1881) 21

CONSTITUTIONAL PROVISION

Fifth Amendment to the United States Constitution 3

STATUTES

18 U.S.C. § 1503. . . . . passim
18 U.S.C. § 1505. . . . . passim
18 U.S.C. § 1510. 14
28 U.S.C. § 1257(3) 2

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IN THE
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FRANKLIN LEWIS,
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v

UNITED STATES,
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PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE FOURTH JUDICIAL CIRCUIT

_____

To the Honorable Chief Justice and
Associate Justices of the Supreme Court
of the United States

Petitioner, Franklin Lewis, prays that a writ of certiorari issue to review the August 10, 1981, judgment of the Circuit Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported as United States of America v. Franklin Lewis, No. 80-5155 (4th Cir. August 10, 1981).

A copy of said opinion and order is attached hereto as Appendix A.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered August 10, 1981. Petitioner's motion for rehearing was denied September 17, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. When prosecuting a defendant pursuant to an indictment brought under 18 U.S.C. § 1505, must the government prove as an element of the crime that the "proceedings" allegedly interfered with were "due and proper" as prescribed by the statute?

2. May a defendant be prosecuted for allegedly violating the omnibus provision of 18 U.S.C. § 1505, when pursuant to an Internal Revenue Service tax delinquency inquiry the defendant acquiesces to a plan to avoid a government levy, and subsequently, at trial,

the government fails to prove a "corrupt" act in furtherance of the proscribed endeavor?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal rests on the fifth amendment to the United States Constitution and 18 U.S.C. § 1505.

STATEMENT OF THE CASE

This is a criminal prosecution of Franklin Lewis under 18 U.S.C. § 1505. Defendant, Franklin Lewis, a resident of Spottsylvania County, Virginia, was the owner and operator of Franklin Lewis Trucking Company and was a partner with Richard Scott in a business known as Bold Trucking Company. During the month of December, 1979, Albert L. Hoosier, an internal revenue officer, was assigned to secure delinquent returns and to collect delinquent taxes from Franklin Lewis. Hoosier's first contact with Lewis was in February, 1980. During that month Hoosier made two separate telephone inquiries to Lewis concerning the delinquent taxes and was

told by Lewis that the taxes would be paid and that the records would be checked to determine if Lewis was liable for the returns.

In 1979 Lewis sold a truck to Sylvester Danny Vick, trading as PromEco Therm Insulation, Inc. (PromEco Therm), reserving a vendor's lien, the April 2, 1980, balance whereon was $2,500. In March of 1980, having been assigned to collect taxes owed by PromEco Therm, Hoosier ascertained that PromEco Therm owed money to Franklin Lewis and, upon inquiry of Vick, was informed that the balance was $2,950.

Having ascertained that Franklin Lewis was liable for his and his partnership's taxes in sums aggregating $4,400, Hoosier caused notices of levy against property of Lewis and against property of the partnership to be served on Danny S. Vick as President of PromEco Therm on April 2, 1980; he then instructed Vick to pay to Internal Revenue Service any sums owed to Lewis.

By telephone call, Vick immediately informed Lewis of the levy. On the next day (April 3), Lewis telephoned Vick that he, also, had received the Notices of Levy. Later in the day, the Sheriff served Vick with a summons to appear in the county court in response to an action Lewis had instituted because PromEco Therm had failed to make monthly payments on the truck. Upon learning that the summons had been issued several days previously, Vick became angry because Lewis had not told him of the pending action. Vick again telephoned Lewis and resumed their conversation concerning the levy notices (saying nothing about the action to repossess the truck) and, in the course of that conversation, it was suggested they could help each other if Vick would backdate a check for the amount owed for the truck. Without Lewis' knowledge, Vick had his wife tape record the conversation.

When the conversation had ended, Vick

initiated efforts to contact Hoosier. Later in the day Hoosier returned Vick's call and, as a result of their conversation, Hoosier made a visit to Vick's home where he heard the recorded telephone conversation which Vick and Lewis had had earlier in the day. At Vick's suggestion, Hoosier listened on an extension telephone while Vick again called Lewis and engaged him in conversation concerning his earlier proposal, again surreptitiously recording the conversation. The substance of these conversations is as follows. After Vick re-initiated the negotiations, Lewis requested Vick to pay to him the balance due on the loan, to backdate the check to March 31, 1980, and to return the notices to Internal Revenue with indication that the $2,500 had been paid to Lewis prior to receipt of the notices. Lewis offered to assign the title of the truck to Vick and to date the transfer March 31, 1980. During the conversation, Vick indicated that he

would pay Lewis $2,000 if Lewis would release the title. After extensive discussion over the amount Vick should pay, Vick promised to call Lewis back and let him know.

REASONS FOR GRANTING CERTIORARI

The federal courts below decided important questions of statutory construction which affect all persons who are or may become involved with government agency proceedings. The courts' failure to recognize the proper elements of an action under 18 U.S.C. § 1505 as well as the statutory prerequisites of bringing the action constitutes an error of interpretation of an important question of federal law.

Furthermore, the Fourth Circuit's decision that the propriety or regularity of the proceeding allegedly interfered with is irrelevant to a determination of criminal liability is in clear conflict with the plain language of the statute.

This is an important question of

federal law which has not been but should be settled by this Court.

Question 1

When prosecuting a defendant pursuant to an indictment brought under 18 U.S.C. § 1505, must the government prove as an element of the crime that the "proceedings" allegedly interfered with were "due and proper" as prescribed by the statute?

The defendant in the instant case was charged with a violation of 18 U.S.C. § 1505, which provides, in pertinent part:

> Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States . . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(Emphasis supplied.) In order to prove that the defendant was guilty of the crime charged the government was required to prove each element of the crime beyond a reasonable doubt.

In re Winship, 397 U.S. 358 (1970). The plain language of the statute reveals that the elements which the government was required to prove in the instant case were that the defendant acted corruptly, and that he influenced, obstructed or impeded the due and proper administration of the collection process of the Internal Revenue Service (IRS).

Both at trial and on appeal the defendant challenged the collection procedures of the IRS which were followed in his case as being improper, and contended that the government had failed to demonstrate the validity of the levy which they issued on the monies due and owing to the defendant. The government contended that the validity of the procedure was not relevant to the prosecution. The Fourth Circuit, in its opinion, stated:

> We agree with the Government that the underlying validity of the levy under the revenue laws of the United States is a matter to be determined in a separate action of a civil nature and may not be used as a defense to a criminal charge such as that in

the present case.

It is respectfully submitted that both the trial court and the Fourth Circuit erred by characterizing the defendant's challenge to the procedures as a "defense." It is the defendant's contention that the validity of the levy procedures is an element of the crime with which he was charged, and that the government's failure to prove that element beyond a reasonable doubt constituted a violation of the defendant's right to due process and requires the reversal of his conviction.

It is a well-settled rule of statutory construction that a statute must be construed in a way that will give significance and effect to every word, rather than render some of them meaningless. Reiter v. Sonotone Corp., 442 U.S. 330 (1979); Ex parte Public Bank of New York, 278 U.S. 101 (1928); Allen Oil Co., Inc. v. Commissioner of Internal Revenue, 614 F.2d 336 (2d Cir.

1980); Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir. 1978). The statute which served as the basis for the defendant's indictment, as well as the indictment itself, refer to the "due and proper" administration of the laws. It is the defendant's contention that this phrase must be interpreted to mean that the government must prove not only that the defendant interfered with the administration of the law, but also that the administration was "due and proper," in order to prove its case. The government argued below that the propriety of the tax collection proceeding was irrelevant to a determination of the defendant's criminal liability. This argument ignores the fact that the statute itself makes the propriety of the proceeding an issue by including the phrase "due and proper" as a limitation on the phrase "administration of the laws." To accept the government's argument would be to render that Congressional

limitation superfluous, and would lead to the result that government officials could institute administrative or judicial proceedings which were clearly in violation of the law, and charge any person who refused to cooperate in those proceedings with a violation of 18 U.S.C. § 1505. It was certainly not Congress' intent to allow such a result, and therefore the "due and proper" limitation contained in § 1505 must be seen as one of the facts necessary for the government to prove a violation of that statute.

It is well settled that due process requires that the government prove every element of a crime beyond a reasonable doubt. In re Winship, supra; United States v. Arias, 575 F.2d 253 (9th Cir. 1978); United States v. Carr, 550 F.2d 1058 (6th Cir. 1977); United States v. Malde, 513 F.2d 97 (1st Cir. 1975); United States v. Cades, 495 F.2d 1166 (3d Cir. 1974). It has also been stated that a mere assumption, without evidentiary

support or a stipulation on the record, does not relieve the government of proving an essential element of its case. United States v. House, 524 F.2d 1035 (3d Cir. 1976). There was no stipulation in the record that the proceedings which preceded the mailing of the notice of levy were proper, and the government introduced no evidence to establish that fact. Rather, the government chose to argue that the fact was not relevant to the criminal proceeding. As shown above, the propriety of the collection procedure, far from being irrelevant, was an essential element of the government's case. Its failure to prove that element, therefore, constituted a denial of due process and mandates reversal of the defendant's conviction.

Question 2

May a defendant be prosecuted for allegedly violating the omnibus provision of 18 U.S.C. § 1505, when pursuant to an Internal Revenue Service tax delinquency

inquiry the defendant acquiesces to a plan to avoid a government levy, and subsequently, at trial, the government fails to prove a "corrupt" act in furtherance of the proscribed endeavor?

Title 18 U.S.C. § 1505 proscribes obstruction of justice during a "proceeding." The definition of a "proceeding" for purposes of this statute may be found by looking to the appropriate cases and available background sources.

During the enactment of 18 U.S.C. § 1510 Congress commented on §§ 1503 and 1505. These comments and their relation to the definition of "proceeding" for purposes of § 1505 were analyzed by the Tenth Circuit in United States v. Browning, Inc., 572 F.2d 720 (10th Cir. 1978). In Browning, the court sought to define the meaning of "proceeding" and noted that:

> Some light was provided by Congress in its report dealing with the enactment of a clarifying section, now § 1510 of the same

> Chapter, 73. On that occasion Congress commented on § 1503 and § 1505 of the Chapter, stating that these sections "presently prohibit attempts to influence, intimidate, impede or injure a witness or juror in a judicial proceeding, a proceeding before a Federal agency, or an inquiry or investigation by either House of the Congress or a congressional committee." That Report continues with the statement that attempts to obstruct a criminal investigation or inquiry before a proceeding has been initiated are not within the contemplation of the mentioned sections. Stated differently, Congress said it was enacting § 1510 so as to supplement § 1503 to cover the protection of witnesses at the pretrial stage of a criminal prosecution.

Id. at 723. Further clarification of the meaning of "proceeding" for purposes of § 1505 may be had by analyzing the various circuit court decisions which have sought to distinguish mere agency inquiries from "proceedings."

In United States v. Abrams, 427 F.2d 86 (2d Cir. 1970), the appellant attorney was representing his clients before the Immigration and Naturalization Service in an

application for voluntary departure. The appellant had attempted to influence a witness and had caused a false statement to be made in an affidavit. The Second Circuit held that an application for voluntary departure constituted a "proceeding" for purposes of § 1505. In Rice v. United States, 356 F.2d 709 (8th Cir. 1966), individual charges were filed with the National Labor Relations Board (NLRB) asserting discrimination by the defendants in shipping assignments. The persons filing the charges were brutally assaulted by the defendants. Subsequently, the defendants were charged with a violation of § 1505. The court held that the charges filed with the NLRB constituted the initiation of "proceedings" such that the "proceeding" requirement of § 1505 was satisfied. In United States v. Batten, 226 F. Supp. 492 (D.D.C. 1964), cert. denied, 380 U.S. 912 (1965), the Securities and Exchange Commission (S.E.C.) ordered an investigation

of the defendant's firm. Pursuant to this order attorneys were designated to administer oaths, subpoena witnesses and perform other duties. An S.E.C. attorney subpoenaed the defendant, administered an oath and interrogated him. The court held that the defendant violated § 1505 where he committed perjury because the S.E.C. action qualified as a "proceeding."

The instant situation is readily distinguishable from the foregoing cases. In the above cases a formal procedure had begun. Each agency initiated steps beyond mere inquiry which propelled its actions into a preliminary investigation that was a prelude to an adversary proceeding.

In the case at hand, the IRS was merely engaged in an inquiry into allegedly delinquent tax returns. Upon notification of the determination that according to IRS records there was a delinquent tax owed, the defendant had the option of: (1) paying the

tax; (2) notifying the IRS of an intention to pay; or (3) advising that there was no liability for the allegedly delinquent returns. The actions engaged in by the IRS cannot be construed as a prelude to an adversary proceeding such that the "proceeding" requirement of § 1505 is satisfied. In those cases in which a satisfactory "proceeding" was found, the administrative agencies had all engaged in more detailed investigatory procedures than in the instant case. To hold, in the instant situation, that a proper IRS "proceeding" had commenced would render the meaning impermissibly broad. To so construe it would have the effect of making all acts of the IRS "proceedings," thereby subjecting to criminal liability any person who impeded any act of the IRS.

Further support for the proposition that no violation of the statute exists may be found through judicial interpretation of the omnibus language following § 1503 which

closely parallels that in § 1505. Section 1503 provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (emphasis supplied). Section 1505 provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or
>
> . . . .
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences,

> obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1505 (emphasis supplied).

It is established that the general omnibus provision at the end of § 1503 must be read to embrace only those acts similar to those mentioned in the preceding specific language. United States v. Essex, 407 F.2d 214 (6th Cir. 1969); Haili v. United States, 260 F.2d 744 (9th Cir. 1958). In Essex, the court refused to permit an obstruction of justice conviction to lie, pursuant to § 1503, where the defendant had perjured herself.

Similarly, in the instant case, the same omnibus provision in § 1505 must be read

in light of the preceding specific language. Whereas the preceding language in § 1503 restricts that statute's applicability to interference with judicial witnesses or jurors, the preceding specific language in § 1505 limits the statute's applicability to interference with a witness appearing in an agency proceeding. The strict construction given the § 1503 omnibus provision must also be given to the identical language in § 1505.

Both §§ 1503 and 1505 require that a "corrupt" act occur in violation of the enumerated provisions. "Corrupt" conduct means more than mere illegal conduct. It implies moral turpitude and intentional fraud. It is synonymous with actual and intentional wrongdoing. Worsham v. Murchison, 66 Ga. 715 (1881). Furthermore, it is generally understood that "corruptly," as employed in the obstruction of justice statutes, means more than the mere endeavor to influence a person. United States v. Haas, 583 F.2d 216 (5th Cir.

1978); United States v. Fasolino, 449 F. Supp. 586 (W.D.N.Y.), aff'd, 586 F.2d 939 (2d Cir. 1978). To interpret the word "corruptly" as imposing no further duty on the prosecution than merely showing an act renders the word superfluous in the statutory scheme. Such a result is impermissible as it is well settled that statutes must be construed so as to give meaning to each word rather than render some of them meaningless. See Reiter v. Sonotone Corp., 442 U.S. 330 (1979); see also discussion in question one, supra.

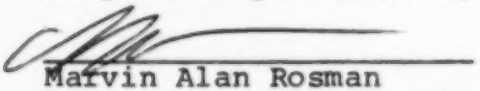
In the instant case no "corrupt" act was proven. At most, the government showed that the defendant acquiesced to Vick's offer to backdate the check in return for a reduction in the amount of the check. It is therefore submitted that, because the government failed to show any "corrupt" act beyond the mere endeavor to arrange the backdating of the check, no violation of § 1505 was proved.

CONCLUSION

The clear import of the decisions below is to interpret the scope of 18 U.S.C. § 1505 so broadly that there exists a real danger that any action taken with regard to an administrative proceeding of any kind could be construed as an obstruction of justice. This result is contrary to the clear intent of Congress, and should be remedied by this Court.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,



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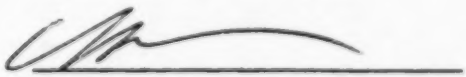
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari filed on behalf of Petitioner Franklin Lewis were duly served upon Respondent United States of America by placing same in the United States Mail first class postage prepaid, certified return receipt requested, addressed to Mr. Justin W. Williams, United States Attorney, Eastern District of Virginia, and Raymond A. Carpenter, Assistant United States Attorney, at Post Office Box 1257, Richmond, Virginia 23210, attorneys for Respondent, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 21st day of October, 1981.

William K. Grogan



Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5155

UNITED STATES OF AMERICA,

Appellee,

versus

FRANKLIN LEWIS,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued: May 7, 1981 Decided: August 19, 1981

Before BUTZNER, Circuit Judge; FIELD, Senior Circuit Judge; and HALL, Circuit Judge.

Henry L. Marsh, III and S. W. Tucker (Hill, Tucker and Marsh on brief) for Appellant; Raymond A. Carpenter, Assistant United States Attorney (Justin W. Williams, United States Attorney on brief) for Appellee.

FIELD, Senior Circuit Judge:

Franklin Lewis was named in an indictment charging that he corruptly obstructed, impeded and endeavored to influence, obstruct and impede the proper administration of the law in a collection action being conducted by

the Internal Revenue Service, in violation of 18 U.S.C. § 1505. Lewis was tried and found guilty by the district court sitting without a jury and has appealed his conviction.

The charges in the indictment stem from the attempts of the Internal Revenue Service to secure delinquent returns and collect delinquent taxes from Lewis. In the course of his attempt to collect the taxes from Lewis, the revenue agent discovered that one Daniel E. Vick owed Lewis money representing the balance of the purchase price of a truck which Vick had acquired from Lewis. The agent caused notices of levy against the property of Lewis to be served on Vick and instructed Vick to pay to the Internal Revenue Service any sums owed to Lewis. Upon learning of this levy, Lewis attempted to persuade Vick to pay him the balance of the purchase price by back-dating a check and representing to the Revenue Service that the

money had been paid to Lewis prior to receipt of the levy notices. The record amply supports the conclusion that Lewis attempted by this ploy to frustrate the Internal Revenue Service in its attempt to collect the delinquent taxes.

Upon appeal Lewis contends that the Government failed to demonstrate the validity of the levy upon the monies due and owing to Lewis from Vick. We agree with the Government that the underlying validity of the levy under the revenue laws of the United States is a matter to be determined in a separate action of a civil nature and may not be used as a defense to a criminal charge such as that in the present case. We are further of the opinion that the evidence was sufficient to show that Lewis acted corruptly and that his conduct was clearly a violation of 18 U.S.C. § 1505. Finally the election by the Government to proceed under 18 U.S.C. § 1505 rather than the provisions of 26 U.S.C. 7212

was not an abuse of prosecutorial discretion.

Perceiving no error of law or fact, the judgment of conviction is affirmed.

A F F I R M E D